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No. 101

In the Supreme Court of the United States

OCTOBER TERM, 1941

JAMES H. HALLIDAY, A PERSON NON COMPOS MENTIS, BY HIS COMMITTEE, ANNIE HALLIDAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH [redacted] Circuit

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the District Court in overruling the motion for a new trial (R. 74–76) is not reported. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 87–96) is reported in 116 F. (2d) 812.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 9, 1941 (R. 97). A petition for rehearing was filed February 7, 1941

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(R. 98–105), and denied March 10, 1941 (R. 106). The petition for a writ of certiorari was filed May 22, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether there was substantial evidence to establish that petitioner became totally permanently disabled while his contract of yearly renewable term insurance was in force.

2. If not, whether the Circuit Court of Appeals under Rule 50 (b) of the Rules of Civil Procedure had power to direct the entry of judgment for the United States where there was no motion for judgment notwithstanding the verdict, but the District Court is shown to have considered whether there was substantial evidence to support the verdict not only upon the Government's motion for a directed verdict but also upon its motion for a new trial.[1]

PERTINENT STATUTE, REGULATIONS, AND RULE

Pursuant to statute (War Risk Insurance Act of October 6, 1917, c. 105, Sec. 402, 40 Stat. 409)

[1] A question reserved for argument if certiorari should be granted is whether the District Court committed reversible error in ruling that evidence would not be admitted as to the condition of petitioner subsequent to the date on which a county probate court adjudged him to be of unsound mind and in instructing the jury that he was to be regarded as totally permanently disabled from that date.

and regulation (Bulletin No. 1, Treasury Department, Regulations & Procedure, United States Veterans' Bureau, Vol. II, pp. 1233–1237) the contract sued upon provided for payment to the insured of monthly benefits at the rate of $5.75 for each $1,000 of insurance in the event he became totally and permanently disabled while the insurance was in force.

Total permanent disability was defined by regulation (Treasury Decision No. 20, Regulations & Procedure, United States Veterans' Bureau, Vol. I, p. 9), pursuant to statutory authorization (Sec. 402, War Risk Insurance Act, *supra*), as follows:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *

Rule 50 (b) of the Rules of Civil Procedure for the District Courts of the United States[2] provides:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the

[2] Hereinafter called the Federal Civil Procedure Rules.

jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

STATEMENT

On November 20, 1936, petitioner, having been adjudged by a county probate court as mentally incompetent on December 9, 1935 (R. 7, 12–16), brought suit by his committee in the United States District Court for the Western District of South Carolina to recover benefits under a $10,000 contract of war risk term insurance. He alleged in his complaint that he was totally permanently disabled on April 2, 1919, the date

of his discharge from the military service (R. 2–5). The contract, which lapsed on that date, was reinstated on August 1, 1920, and remained in force until October 31, 1920 (R. 18, 88). Accordingly, the issue submitted to the jury was whether petitioner was totally permanently disabled on or before the latter date (R. 66–67).

The Government moved for a directed verdict at the close of the evidence on the ground, among others, that there was no substantial evidence that the petitioner was totally permanently disabled while his insurance was in force. The motion was denied (R. 59–60). The jury rendered a verdict for petitioner, finding that he became totally permanently disabled on April 2, 1919 (R. 72). The Government made a motion for a new trial (not contained in the record), which was overruled in an opinion disclosing, *inter alia*, that, in accordance with its ruling on the Government's motion for a directed verdict, the District Court was of the opinion that "there was ample evidence to go to the jury" (R. 74). No motion for a judgment notwithstanding the verdict was made. Judgment for petitioner was entered on the verdict (R. 77–79) and the Government appealed (R. 79). The Circuit Court of Appeals held that there was no substantial evidence that petitioner was totally permanently disabled while his insurance was in force (R. 88–89) and reversed and remanded with directions to enter judgment for the Government (R. 97).

The Circuit Court of Appeals relied on the provision in Rule 50 (b), *supra*, for the automatic reservation of the legal questions raised by a motion for directed verdict, as establishing its power to direct the entry of judgment for the Government. The court also held that the Government's failure to make a motion for judgment notwithstanding the verdict, as permitted by the Rule, did not prevent it from exercising that power, although "it would have been the course of wisdom" for the Government to have made such a motion. The exercise of the power to direct the entry of judgment, rather than the granting of a new trial, was, the Circuit Court of Appeals indicated, warranted in the instant case in the interest of "the orderly administration of justice" (R. 94–96).

The Circuit Court of Appeals expressed the view, *obiter*, that the District Court had erred in ruling that no evidence would be admitted as to petitioner's condition subsequent to December 9, 1935, the date on which the county probate court had adjudged him to be mentally incompetent. The Circuit Court of Appeals was of the opinion that this adjudication, which was made in an informal and *ex parte* proceeding, was only prima facie evidence of insanity as against one not a party to the proceeding, and, in any event, was not conclusive evidence of total permanent disability (R. 93–94).

ARGUMENT

I

In contending that the Circuit Court of Appeals erred in holding that the District Court should have directed a verdict for the Government, petitioner does not rely upon any physical disorder but solely upon a mental condition (Br. 12–20).[2] We submit that there was no substantial evidence showing the existence prior to the expiration of insurance protection on October 31, 1920, of any mental disorder rendering petitioner totally permanently disabled.

Although petitioner was hospitalized for six months of his service in the Army for slightly more than nine months (June 23, 1918, to April 2, 1919, R. 2), the hospital records carry no notation that he was suffering from any mental disorder which might be considered disabling, nor was any such notation made when petitioner was examined by a physician at the time of his discharge (R. 44–49). The first two hospital records, made

[2] The record indicates that upon his return from service petitioner was physically handicapped so far as any strenuous farm work was concerned, primarily because of arrested tuberculosis and hyperacidity of the stomach (R. 8, 28, 29, 34, 40–41, 98). However, immediately before he went into the Army petitioner had successfully carried on as a clerk in a drygoods store at a salary of $150 a month (R. 25, 43). There was no evidence that his physical condition would have prevented him from engaging in some activity of this type or in some occupation involving less physical exertion than farming.

shortly after petitioner had suffered a back injury, merely stated that he was "very nervous," that he "looks nervous, but not particularly sick," and that he "gives impression of neurasthenia" (R. 45–46).

To cover the period between petitioner's return to his home from the Army in April 1919, and the termination of insurance protection on October 31, 1920, petitioner relied upon the testimony of a Doctor Land, as well as lay testimony given by two of his brothers, his wife and two friends or acquaintances who had known him prior to his military service.[4]

With reference to the crucial period, one brother testified merely that petitioner when he returned from the Army was nervous (R. 28), and another simply that he was very badly torn up mentally, was a mental wreck, and inclined to talk continually about the War (R. 43). A friend stated only that petitioner was a changed man and was indifferent or argumentative to former friends (R. 25), and an acquaintance merely that he was nervous and did not have the best control of himself (R. 26–27). Obviously this testimony was too generalized to be of any evidential value in respect of the issue of total permanent disability.

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[4] Another lay witness did not become acquainted with petitioner until 1925 (R. 20), and still another testified only as to petitioner's mental and nervous condition from about 1927 (R. 23–24).

The testimony of the wife, so far as it is relevant to the pertinent period, is equally indefinite and not indicative of any disabling mental condition. She testified that at the time of their marriage on April 16, 1921, over five months after petitioner's insurance lapsed, petitioner was suspicious of everybody and that this had been true since his discharge from the service (R. 8). But that the wife did not then or for a considerable time think that the petitioner was mentally disabled is evident from the facts that she permitted him to court her over a period of several years, that she married him and bore him four children, that three years after their marriage they rented one farm of 50 acres and several years later bought another farm of 75 acres (R. 10–11), and that she took no steps to have petitioner adjudged mentally incompetent or to have herself appointed as his committee until December 9, 1935 (R. 12). Even then petitioner's confinement in a mental hospital was not deemed necessary and the adjudication was sought solely to permit someone to transact for the petitioner whatever business he had (R. 39).[5]

[5] The only specific instances of mental abnormality to which petitioner's wife testified—threats of suicide, threats to kill her and the children, fear of poisoning (R. 8), as to none of which was a definite or even approximate date given—evidently occurred long after the period of insurance protection. As to petitioner's threats regarding his wife and children, cf. R. 10.

Moreover, it appears from her testimony that at the time of their marriage in April 1921, petitioner was taking a vocational training course in agriculture at Waynesville, North Carolina, and that he continued in his vocational training there and at Athens, Georgia, until 1924, a period of over three years (R. 7, 10). While petitioner's wife testified that "He did not go to school every day" (R. 10), no light was attempted to be shed on petitioner's mental condition while he was taking vocational training through the introduction of the vocational training records.

The only medical evidence introduced by petitioner which, we believe, had any real evidential value, so far as his mental condition is concerned, is petitioner's Exhibit No. 1, consisting of some 18 reports of examinations of petitioner by Government medical examiners and at Government hospitals covering the period from April 12, 1920, to April 11, 1935, and apparently made for purposes of compensation and vocational training (R. 29–34).[6] The two reports made during the period of insurance protection make no mention of any mental or nervous condition (R. 29). The third, rendered on February 14, 1921, three and one-half months after petition-

[6] Several later reports were excluded by the District Court because of its ruling as to the conclusiveness on the issue of total permanent disability of petitioner's adjudication as a mental incompetent by the county probate court on December 9, 1935 (R. 35; see also R. 12–19).

er's insurance lapsed, has merely a notation of "hypochondriasis" (R. 29).[7] The next eight, embracing the period from February 16, 1921, to December 17, 1924, carry no notation of any mental or nervous condition (R. 30). Indeed, the report of December 17, 1924, the first of the reports which mentions any mental or neuropsychiatric examination as such, states that "There is no history or evidence of any psychosis" and that "There is no N. P. [neuropsychiatric] Disability." The remaining 7 reports, commencing with November 24, 1925, refer to psychoneurosis and psychosis, neurasthenic type, and neurasthenia, but practically all of them note that it was of moderate degree. It is obvious that these reports were of no aid to the petitioner in establishing that he was totally permanently disabled from a mental disorder before his insurance expired in October 1920, and, indeed, in our opinion, tended to refute his claim.

Petitioner produced but one medical witness, Dr. Land. He testified that he had known petitioner since he was "a little tot"; that he was a bright boy when he went into the Army; that when he was discharged from the service he had a mental condition which, the doctor thought, was psychoneurosis, "In other words, he was rather much of a

[7] This term is defined in the American Medical Dictionary (Dorland) as follows: "Hypochondriasis: Morbid anxiety about the health, often associated with a simulated disease and more or less pronounced melancholia."

hypochondriac"; and that psychoneurosis was a mental condition which makes a man think he has everything the matter with him. The doctor also stated that he would not have advised petitioner to do any work since he has been out of the Army, as work would have resulted in a complete collapse mentally and physically; that he did not hold any hope for petitioner's recovery, apparently from his mental condition, when he got out of the Army because a man in his condition would go from bad to worse; and that his condition, the doctor thought, had gradually progressed (R. 35–36). But, we submit, when this testimony is appraised in the light of the doctor's other testimony, it had little, if any, probative value and certainly did not rise to the degree of substantial evidence on the decisive question as to whether, mentally, petitioner was totally permanently disabled before insurance protection terminated in October 1920. Thus, it appears from the doctor's testimony that he was a general practitioner and not an expert on mental disorders (R. 38); that he had been petitioner's physician only since about 1932 or 1933 (R. 37, 40); that when he first examined petitioner at that time, petitioner had a real and not a fancied ailment (hyperacidity of the stomach), for which the doctor prescribed (R. 41), that his contacts with petitioner prior to 1932 consisted merely of seeing and talking with petitioner on the street several times a year (R. 38, 40); that he could not say definitely whether he had seen petitioner while petitioner was

taking vocational training in Waynesville and Athens (R. 38); and that when he did see petitioner he had "simply shunted him off and got away from him as best I could" (R. 41).

Moreover, the record is barren of evidence that petitioner was treated for any mental condition.[5] He could have been treated at Government expense but, according to the testimony of his wife, resented going to a hospital for mental diseases (R. 11–12). Consequently, the record leaves wholly in the realm of speculation the crucial question as to whether, if it be assumed that petitioner had a totally disabling mental disorder prior to the expiration of insurance protection, such disorder was then permanent in character, not subject to cure or alleviation by treatment. It is well recognized in war-risk insurance cases that a verdict may not rest upon such a conjectural basis and that where, as here, there is a failure to take treatment for a condition not shown to be incurable, the mere continuance of total disability does not constitute substantial evidence that it was permanent from its inception. *Falbo* v. *United States*, 64 F. (2d) 948 (C. C. A. 9th), affirmed *per curiam*, 291 U. S. 646; *Theberge* v. *United States*, 87

[5] While petitioner had numerous contacts with Government examiners and Government hospitals, as is apparent from his Exhibit No. 1 (*supra*, p. 8), these contacts were evidently for the purpose of observation and diagnosis in connection with vocational training and compensation, and not for treatment.

F. (2d) 697, 699 (C. C. A. 2d); *United States* v. *Rentfrow*, 60 F. (2d) 488, 489 (C. C. A. 10th); *United States* v. *Hill*, 62 F. (2d) 1022, 1025 (C. C. A. 8th); *Walters* v. *United States*, 63 F. (2d) 299, 301 (C. C. A. 5th). Such holdings do not in any sense penalize an insured, as petitioner seems to suggest (Br. 14–15), but rest upon the contract provision which makes permanence of total disability a condition to maturity of the insurance. Hence the doctrine is just as applicable to a case of mental disability as to any other type of case. See *United States* v. *Kiles*, 70 F. (2d) 880 (C. C. A. 8th).

II

If the Circuit Court of Appeals was correct in holding that there was no substantial evidence that petitioner was totally permanently disabled when his insurance expired in October 1920, the question then arises as to whether that court had the power to direct judgment to be entered for the Government in lieu of granting a new trial.[9]

[9] If the court had such power, we believe it is clear that it was properly exercised in the interest of "the orderly administration of justice." Petitioner makes no contention to the contrary and obviously there is no ground for a new trial by reason of any ruling prejudicial to petitioner or any reason to assume that petitioner could make a better case upon another trial. Indeed, the nature of the deficiencies in his proof heretofore discussed indicates that he could not.

(a) This question involves the construction of Rule 50 (b) of the Federal Civil Procedure Rules. This Court in *Berry* v. *United States*, No. 336, October Term, 1940, and *Conway* v. *O'Brien*, No. 344, October Term, 1940, granted writs of certorari to resolve a similar question, but found it unnecessary to do so because of its conclusion in each case that there was substantial evidence warranting submission of the case to the jury. While we do not believe that the present case is subject to the same disposition, the question raised in the *Berry* and *Conway* cases is, we believe, different from the question here presented for the reason that in neither of those cases was there a post-verdict consideration by the District Court of the question raised by the motion for a directed verdict. In the instant case, however, while the Government did not make a motion specifically requesting a judgment notwithstanding the verdict, it did, as is apparent from the District Court's opinion, invoke consideration of the question raised by its motion for a directed verdict by filing a motion for a new trial, and the court specifically passed upon that question when, in denying the motion for a new trial, it held that "there was ample evidence to go to the jury" (R. 74). This, we believe, resulted in substantial compliance with the design and purpose of the provision of Rule 50 (b) for the filing of a motion for judgment notwithstanding the verdict, if such a motion be

deemed a condition precedent to the exercise of power by a Circuit Court of Appeals to direct judgment. The mere fact that the Government in the instant case did not specifically ask for a judgment notwithstanding the verdict would seem to be of no consequence. Cf. Rule 54 (c).[10]

(b) If, however, the case may be regarded as presenting the point upon which this Court granted writs of certiorari in the *Berry* and *Conway* cases, the decision of that point by this Court may nevertheless now be deemed unnecessary.

The point is not likely to arise in the future. It has arisen in the past only in cases, such as the present case and the *Berry* and *Conway* cases, which were tried relatively soon after the effective date of the new Rules and during the period of lack of familiarity on the part of the Bar with

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[10] That Rule provides: "(c) DEMAND FOR JUDGMENT. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

the new procedures prescribed by Rule 50 (b). The lapse of time has afforded an opportunity for counsel to become familiar with the procedural changes embodied in Rule 50 (b) and the opinions of this Court in the *Berry* and *Conway* cases have focused the attention of the Bar upon the advisability of specific compliance with the provisions of the Rule.[11]

CONCLUSION

It is respectfully submitted that the case involves no question requiring review by this Court on writ of certiorari and that the petition should therefore be denied. However, if the petition is granted, we submit that review should be limited to the procedural point arising under Rule 50 (b), since the decision of the Circuit Court of Appeals as to the legal sufficiency of the evidence is correct and the principles of law involved in respect

[11] Of course, if this Court should decide to review the point, the Government will urge the correctness of the decision of the Circuit Court of Appeals. See the Government's brief in the *Berry* case.

thereto have been sufficiently elucidated by the prior decisions of this Court.[12]

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[12] If certiorari is granted the Government will urge (as grounds for supporting the reversal by the Circuit Court of Appeals of the judgment for petitioner) that the District Court erred in ruling that no evidence would be admitted as to petitioner's condition subsequent to the adjudication by the county probate court that he was mentally incompetent (R. 12–19) and in instructing the jury (R. 68–69, 71) that, as a matter of law, the petitioner was to be regarded as totally permanently disabled from the date of that adjudication.

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